(2)

No. 99-1970

Supreme Court, U.S.
FILED
JUL 10 2000
CLERK

IN THE

Supreme Court of the United States

LUIS FUENTES,

Petitioner,

v.

WAGNER, WARDEN; KONEMANN, CORRECTIONAL OFFICER; KLEEMAN, CORRECTIONAL OFFICER; DONATO, CORRECTIONAL OFFICER; BROWN, SERGEANT; WERST, ASSISTANT WARDEN; AND BERKS COUNTY, PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Margaret A. McAllister
Counsel of Record

Daniel J. Divis
Attorney

German, Gallagher & Murtagh
The Bellevue, Suite 500
200 S. Broad Street
Philadelphia, PA 19102
(215) 545-7700

Attorneys for Respondents

PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTION PRESENTED

Whether the Third Circuit was correct in ruling that where an unsentenced inmate alleges an excessive force claim arising from prison officials' conduct in response to a violent prison disturbance created by the inmate, the "shocks the conscience" test applies as the appropriate gauge of the officials' conduct.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

Relevant Factual Background 1

Relevant Procedural History of the Action in the District Court 2

Relevant Procedural History of the Action in the Third Circuit 6

REASONS FOR DENYING THE WRIT 9

I. The Supreme Court Provides Guidance on Excessive Force Claims 9

II. The Federal Courts of Appeal are Not in Conflict .. 10

A. The "Objective Reasonableness" Standard 11

B. The "Shocks the Conscience" Standard. 13

C. The "Malicious and Sadistic" Standard 14

III. The Third Circuit Correctly Applied the Shocks the Conscience Test 15

CONCLUSION 17

APPENDIX

The Trial Court's Instruction to the Jury on Excessive Force 1b

Petitioner's Proposed Jury Instruction on Excessive Force 4b

TABLE OF AUTHORITIES

Federal Cases ***Page***

Bell v. Wolfish, 441 U.S. 520 (1979) 3, 6, 12

Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986)..... 11

City of Revere v. Masachusetts Gen. Hosp., 463 U.S. 239 (1983)..... 16

Collins v. Harker Heights, 503 U.S. 115 (1992) 9

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 7, 9-11, 13-15

Daniels v. Williams, 474 U.S. 327 (1986).....9, 11

Freeman v. Jackson, 107 F.3d 875, 1997 WL 61226 (8th Cir. 1997)..... 11

Fuentes v. Wagner, 206 F.3d 335 (3d Cir. 2000).... 6-8, 13, 15

Graham v. Connor, 490 U.S. 386 (1989) 6

Hudson v. McMillian, 503 U.S. 1 (1992) 7-8, 12, 16

Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied,* 414 U.S. 1033 ..... 7-8, 13-15

Norman v. Taylor, 25 F.3d 1259 (4th Cir. 1994) 14

Pierce v. Multnomah County, 76 F.3d 1032 (9th Cir. 1996), *cert. denied,* 117 S.Ct. 506 12-13

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997), *cert. denied,* 522 U.S. 1030 14

Rochin v. California, 342 U.S. 165 (1952).....9, 11

Rodriguez v. Phillips, 66 F.3d 470 (2d Cir. 1995) 15

Smith v. Copeland, 892 F.Supp. 1218 (E.D. Mo. 1995), *aff'd,* 87 F.3d 265 (8th Cir. 1996) 11

Taylor v. McDuffie, 155 F.3d 479 (4th Cir. 1998), *cert. denied,* 525 U.S. 1181 14

Telfair v. Gilberg, 868 F.Supp. 1396 (S.D. Ga. 1994), *aff'd,* 87 F.3d 1330.....3, 7

TABLE OF AUTHORITIES—*(Continued)*

Federal Cases, continued ***Page***

Titran v. Ackman, 893 F.2d 145 (7th Cir. 1990) 3, 11

United States v. Cobb, 905 F.2d 784 (4th Cir. 1990), *cert. denied,* 498 US. 1049..... 13

United States v. Lanier, 520 U.S. 259 (1997)..... 6

United States v. Walsh, 194 F.3d 37 (2d Cir. 1999)..... 14-15

Valencia v. Wiggins, 981 F.2d 1440 (5th Cir. 1993), *cert. denied,* 113 S.Ct. 2998..... 6-7

Washington v. Glucksberg, 521 U.S. 702 (1997)..... 13

White v. Roper, 901 F.2d 1501 (9th Cir. 1990)..... 12

Whitley v. Albers, 475 U.S. 312 (1986)..... 7, 10, 12, 16

Wilson v. Williams, 83 F.3d 870 (7th Cir. 1996)..... 3, 11-12

Wolff v. McDonnell, 418 U.S. 539 (1974) 9

Federal Statute

42 U.S.C. § 1983 2

STATEMENT OF THE CASE

Relevant Factual Background

In December of 1995, Luis Fuentes was a federal inmate housed in the behavioral adjustment unit ("BAU") of the Berks County Prison. Pet. App. 3a. Fuentes had pled guilty to federal drug charges and was awaiting sentencing. *Id.* He was in the BAU for having previously tried to escape from the prison. Pet. App. 24a.

On December 28, 1995, the weather prevented the BAU inmates from their one hour outdoor exercise period. Pet. App. 3a. In place of outdoor exercise, the inmates were released individually from their cells to exercise in the hallway by their cell. *Id.* While another inmate was exercising, Fuentes yelled for a correctional officer. An officer came to Fuentes' cell and asked what the problem was. Fuentes said that it was nothing. A short while later, Fuentes began yelling again and, this time, kicked at his cell door. *Id.* At the time he kicked the cell door, Fuentes was aware that banging on cell doors was a violation of the rules of the BAU. Pet. App. 24a. Correctional Officers Konemann and Kleeman came to Fuentes' cell at which time Fuentes claimed that another inmate urinated onto the floor of his cell. Pet. App. 4a. The officers did not see urine on the floor of the cell, but Kleeman noticed wetness on the door and floor outside of Fuentes' cell. *Id.*

Pursuant to policy of the BAU, prior to entering an inmate's cell, the inmate must be handcuffed. *Id.* Konemann and Kleeman asked Fuentes to extend his hands so that he could be handcuffed. *Id.* He complied and the officers entered the cell. *Id.* The officers told Fuentes that they would be stripping his cell because he kicked the door. *Id.*[1]

Konemann began removing the sheets. Pet. App. 4a. Fuentes grabbed the sheets out of Konemann's hands and yelled, "this is bullshit. You're not going to strip my cell." Pet.

---

1 Cell stripping is a procedure which may be used when an inmate is causing a disturbance. It consists of removing from the cell all items except the clothes on the inmate's back, his legal papers and his toothbrush. For the first violation, the cell is stripped for 24 hours. For each subsequent infraction, an additional 24 hours is added. Pet. App. 24a.

App. 25a. Konemann attempted to retake the sheets from Fuentes. Fuentes swung at Konemann's head with his handcuffed fists. Pet. App. 4a. Konemann saw Fuentes swing and pushed him away. *Id.* Fuentes lunged at Konemann. Pet. App. 25a. As he did so, Kleeman grabbed Fuentes and wrestled him to the ground. *Id.* While on the ground, Fuentes attempted to free himself by kicking, struggling, and attempting to get to his feet. *Id.*

Correctional Officer Donato arrived shortly after Konemann and Kleeman began stripping the cell, but she left to get leg shackles and call for assistance. Pet. App. 4a. Donato returned with the leg shackles and several other officers. Pet. App. 5a. The officers placed the leg shackles on Fuentes, carried him to another cell, and, in accordance with prison policy, placed Fuentes in a restraint chair. Pet. App. 25a. It should be noted that Fuentes' claim of excessive force was for the initial confrontation in his cell only. Pet. App. 6a. Afterward, Plaintiff was examined by the prison nurse. Pet. App. 6a.

She observed no significant injuries. *Id.* She saw only minor edema on Fuentes' wrists and noted that Fuentes complained of pain in his right lower rib cage. *Id.*

Relevant Procedural History of the Action in the District Court

Fuentes brought an action in the Eastern District of Pennsylvania, alleging several claims including a Section 1983 of Title 42, U.S. Code claim for use of excessive force in violation of the Fourteenth Amendment's right to be free from the use of excessive force. Pet. App. 5a. Specifically, Fuentes claimed that on December 28, 1995, Correctional Officers Konemann and Kleeman beat him in his cell and that this application of physical force was excessive and unnecessary under the circumstances. Pet. App. 6a. Fuentes claimed that Correctional Officer Donato observed the use of excessive force against him and failed to intervene. The officers denied the claims.

The parties consented to proceed before a jury and Magistrate Judge M. Faith Angell. The parties submitted proposed jury instructions. Fuentes submitted the following instruction on the excessive force claim:

> 16. Right to Be Free from Use of Excessive and Unnecessary Force
>
> The first constitutional right at issue in this case is the Fourteenth Amendment right to be free from the use of excessive force. Mr. Fuentes alleges that defendants Konemann and Kleeman beat him in his cell on December 28, 1995, and that this application of physical force was excessive and unnecessary under the circumstances. Mr. Fuentes also alleges that defendant Donato observed the use of excessive force against him and failed to intervene.
>
> In order to prove that the defendants used excessive and unnecessary force, the plaintiff must prove by a preponderance of the evidence: (1) that the plaintiff suffered some harm, (2) that the harm resulted directly from the use of force that was clearly excessive in relation to any need for use of force, and (3) that the excessiveness of the force was objectively unreasonable in light of the facts and circumstances at the time.
>
> Some of the factors you may consider in determining whether the defendants used excessive force are: (1) the extent of the injury suffered, (2) the need for the use of force, (3) the relationship between that need and the amount of force used, (4) the threat reasonably perceived by the prison guards involved, and (5) any efforts made to temper the severity of the forceful response.
>
> *From Wilson v. Williams,* 83 F.3d 870, 873-74 (7th Cir. 1996); *see also Bell v. Wolfish,* 441 U.S. 520, 538-39, 561 (1979); *Telfair v. Gilberg,* 868 F. Supp. 1396, 1412-13 (S.D. Ga. 1994), *aff'd,* 87 F.3d 1330 (11th Cir. 1996); *Titran v. Ackman,* 893 F.2d 145, 147 (7th Cir. 1990).

Sup. App. 4b (citation in original).

The jury trial was held between November 3-6, 1998. On the excessive force claim, the court instructed the jury as follows:

> With regard to the excessive force claim, plaintiff alleges that Defendants Konemann and Kleeman beat him in his cell on December 28th, 1995 and that this application of physical force was excessive and unnecessary under the circumstances. Plaintiff seeks to hold Defendant Donato liable for observing this use of excessive force and for failing to intervene on his behalf. Under the Fourteenth Amendment of the Constitution, an individual who has not yet been sentenced, has the right to be free from excessive force. A prison official may only use the amount of force necessary under the circumstances.
>
> To succeed on his claim of excessive force, plaintiff must show by a preponderance of the evidence, that one or more of the defendants inflicted unnecessary and wanton pain and suffering. You must decide whether the force applied was in a good faith effort to maintain or restore discipline, in which case, you must find that the defendants did not use excessive force or whether the force applies [sic] was inspired by an unwise, excessive zeal, amounting to an abuse of official power, that shocks the conscience, in which case, you must find that one or more of the defendants did use excessive force.
>
> In considering the degree of force, a reasonable prison official would use under the circumstances of this case, you may consider such factors as: The need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, the extent of the threat to the safety of the staff and inmates as reasonably perceived by reason—responsive—officials and any efforts made to temper the severity of a forceful response.
>
> In order to prevail on his claim of use of excessive force, the plaintiff must prove that he suffered some

> physical or psychological injury. Certain *de minimis* uses of physical force provide that — certain *de minimis* uses of physical force provided that the use is not of the sort repugnant to the conscience of mankind, do not rise to the level of a constitutional infringement. However, the plaintiff need not establish a significant or serious physical or psychological injury in order to establish excessive force. He must prove by a preponderance of the evidence, that he sustained more than *de minimis* physical or psychological injuries resulting from the use of a [sic] excessive force by one or more of the defendants.
>
> With regard to the excessive force claim against Correctional Officer Donato, she is not alleged to have actually used force against the plaintiff. Plaintiff's excessive force claim against this defendant, rests on an alleged failure to intervene. In order to hold Correctional Officer Donato liable for excessive force, plaintiff must prove by a preponderance of the evidence that she was present in the D Unit, that she saw — D meaning Delta Unit — that she saw excessive force being applied against the plaintiff and that she did not attempt to stop it.

Sup. App. 1b-3b. Fuentes objected to the use of "shocks the conscience" in the instruction. Pet. App. 17a.

The jury found in favor of defendants. Pet. App. 3a.[2] Consistent with the jury's verdict, the Magistrate Judge entered judgment in favor of defendants and against Fuentes. Pet. App. 3a.

---

2 The Magistrate Judge granted summary judgment in favor of the prison officials on Fuentes substantive due process claim for cruel and unusual punishment under the Eighth and Fourteenth Amendments. Fuentes remaining claims proceeded to trial and included claims for: excessive force under the Eighth and Fourteenth Amendments, procedural due process under the Fourteenth Amendment, and state law claims for assault and battery, and false imprisonment. Pet. App. 2a-3a.

Relevant Procedural History of the Action in the Third Circuit

Fuentes appealed to the United States Court of Appeals for the Third Circuit, arguing several issues including a claim that the trial court erred when instructing the jury on the excessive force claim. Fuentes claimed that his "objective reasonableness" instruction should have been given to the jury. In a well reasoned opinion, the Third Circuit upheld the verdict and concluded that the jury instruction on excessive force was proper.

In deciding the issue, the Third Circuit first looked to *Graham v. Connor,* 490 U.S. 386 (1989) wherein the Court stated that the "objective reasonableness" test has its foundation in the Fourth Amendment and is applied properly in excessive force claims arising from investigatory stops and/or arrests. Pet. App. 18. The Third Circuit determined that Fuentes was not entitled to an "objective reasonableness" instruction. Pet. App. 18. In Petitioner's Brief, he states incorrectly that the Third Circuit "concluded that a Fourth Amendment standard was appropriate only in claims arising from investigatory stops and/or arrests." Pet. 5.[3]

Secondly, the Third Circuit addressed the *Bell v. Wolfish,* 441 U.S. 520 (1979) standards for "conditions of confinement" cases, but agreed, instead, with the analysis of *Valencia v. Wiggins,* 981 F.2d 1440 (5th Cir. 1993), *cert. denied,* 113 S.Ct. 2998, that *Bell* "while working 'well for claims of improper conditions or restrictions,... does not lend itself to analysis of claims of excessive force in controlling prison disturbances.' " Pet. App. 19a (alteration in original). The court in *Valencia* was confronted with the issue of a pretrial detainee's excessive force claim against a prison guard in the context of a prison

3 In *United States v. Lanier,* 520 U.S. 259 (1997), the Court explained that *Graham* does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

disturbance. *See Valencia,* 981 F.2d 1440. Pursuant to *Bell,* the Third and Fifth Circuit courts, here, noted that there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates and, accordingly, there is no reason to distinguish between the two when reviewing challenged security practices. Pet. App. 19a.

To determine the standard to apply to gauge the conduct of the prison officials, the Third Circuit again agreed with the analysis of the court in *Valencia. Id.* In *Valencia,* the court stated that:

> we are guided by the standard announced in *Whitley* and *Hudson.* While these cases specifically addressed claims of excessive use of force brought by convicted prisoners, it is impractical to draw a line between convicted prisoners and pretrial detainees for the purpose of maintaining jail security. Moreover, the Court indicated in *Hudson* that many of its concerns in *Whitley* were not limited to Eighth Amendment claims but "arise whenever guards use force to keep order." It further observed that claims based on excessive force and claims based on conditions of confinement are different in kind.

Pet. App. 19a (citing *Valencia,* 981 F.2d at 1446). The Third Circuit held that the Eighth Amendment cruel and unusual standards found in *Whitley v. Albers,* 475 U.S. 312 (1986) and *Hudson v. McMillian,* 503 U.S. 1 (1992) apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. Pet. App. 20a.

Finally, the Third Circuit looked to the 1998 Supreme Court case, *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) to address Petitioner's claim that it was error to instruct the jury on the shocks the conscience test. *Id.*[4] In *Lewis,* the Court concluded that the "shocks the conscience" standard applies to police pursuit cases and analogized the police offic-

---

4 The court in *Valencia* rejected the shocks the conscience test. However, as the court in *Telfair v. Gilberg,* 868 F. Supp. 1396 (S.D. Ga. 1994), *aff'd,* 87 F.3d 1330, correctly observed, *Valencia* derived its excessive force test from *Whitley* and *Hudson* which derived their standards from *Johnson*

ers' situation in a pursuit case to that of prison officials who have to respond immediately to a violent prison disturbance to restore and maintain order and security. Pet. App. 21a. The Third Circuit cited *Hudson, supra,* wherein the Court noted that officials confronted with a prison disturbance, whether the disturbance is a riot or a lesser disruption, "must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force . . . [and] should be accorded wide-ranging deference . . . that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Pet. App. 21a.

The Third Circuit observed that at the time of the incident in Fuentes' cell, Fuentes' behavior was violent and disruptive at his own initiative. Pet. App. 22a. His behavior, if left unchecked, could have aroused other inmates to violence who, in turn, could hurt others or themselves. Fuentes' behavior of swinging at Konemann's head with handcuffed fists, if left unchecked, could have resulted in serious injury to Konemann and the other officials. Kleeman, Konemann, and Donato had to respond quickly to stop the disturbance, minimize the disturbance that Fuentes was causing, and to protect themselves and the security of the correctional facility. The Third Circuit determined that the "shocks the conscience" test to gauge the official conduct, the same test that the Supreme Court has used in analogous cases, including high speed chases, was appropriate here. Pet. App. 22a.

NOTES *(Continued)*

v. Glick. Id. at 1411 n.5. The court in *Johnson* used the shocks the conscience test. *Johnson,* 481 F.2d 1028 (2d Cir. 1973), *cert. denied,* 414 U.S. 1033.

REASONS FOR DENYING THE WRIT

Fuentes, an unsentenced inmate, caused a prison disturbance, necessitating official conduct to act quickly to protect themselves and the security of the correctional institute. As an alleged result of the encounter, Fuentes sustained minor edema and bruising of his wrists and he had complaints of pain to his right, lower, rib cage. Fuentes contends that the Court has not provided guidance to lower courts to determine the appropriate standard to apply when an unsentenced inmate alleges excessive use of force by a correctional officer. Also, he contends that federal courts across the country inconsistently decide the issue. Petitioner paints a dire picture for pretrial detainees and one unwarranted in light of the liberty interest at issue and the history, traditions and practices surrounding due process.

I. The Supreme Court Provides Guidance on Excessive Force Claims

It is well settled that the core of due process is protection against arbitrary action. *County of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998); *see Wolff v. McDonnell,* 418 U.S. 539, 558 (1974) (stating that the touchstone of due process is protection of the individual against arbitrary action). Criteria to identify what is fatally arbitrary differs depending upon whether a legislative or specific act of a government official is at issue. *Lewis,* 523 U.S. at 845. The Court in *Lewis* cites *Collins v. Harker Heights,* 503 U.S. 115, 129 (1992) and *Daniels v. Williams,* 474 U.S. 327, 332 (1986) to stress that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,' " and "that it is a *constitution* that we are expounding," respectively. *Id.*

That being said, the Court in *Lewis* noted that for half of a century, the cognizable level of executive abuse of power is that which shocks the conscience. *Id.* (citing *Rochin v. California,* 342 U.S. 165 (1952)). The Court cautioned that the concept of that conduct which shocks the conscious is fluid:

> Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate

> indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.

Lewis, 523 U.S. at 849. For example, conduct that shows deliberate indifference in the custodial situation of a prison, such as failing to provide for basic human needs, where forethought is feasible and obligatory, can rise to a constitutionally shocking level. *Id.* However, a much higher standard of fault than deliberate indifference has to be shown for officer liability in prison riots and high speed chases. *Id.* The rationale is that officials in these circumstances must make decisions "in haste, under pressure and without the luxury of a second chance." *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). The Court in *Lewis* explained that in those circumstances "liability should turn on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.' " *Id.* The Court held that intent to harm was needed for constitutional liability in police pursuit cases and stated that the fault claimed by the plaintiff, "conscious disregard," failed to meet the shocks the conscience test. *Lewis*, 523 U.S. at 850. The Court stated that the analogy to prison riot cases would be hard to avoid. *Id.* at 849.

After reading *Lewis* and the cases cited therein, there can be no doubt that the Court has provided guidance on the standards of conduct that violate substantive due process in excessive force cases.

II. The Federal Courts of Appeal are Not in Conflict

An analysis of the decisions of the Federal Courts of Appeal to which Petitioner cites reveals that, with few exception, the courts are not in conflict. Different factual circumstances properly warrant courts to reach different standards to address excessive force claims. Moreover, every case cited by Petitioner in support of the contention that the courts are in conflict predates *Lewis*.

A. The "Objective Reasonableness" Standard

Petitioner contends that the Eighth, Seventh and Ninth Circuits judge a pretrial detainee's excessive force claim by whether the correctional officers' conduct was "objectively reasonable." First, Petitioner cites to Eighth Circuit cases, *Freeman v. Johnson,* 107 F.3d 875, 1997 WL 61226 (8th Cir. 1997) and *Smith v. Copeland,* 892 F. Supp. 1218 (E.D. Mo. 1995), *aff'd,* 87 F.3d 265 (8th Cir. 1996). These cases provide little support to the argument.

Freeman, an unpublished opinion, involves a claim for excessive force brought by a pretrial detainee. *Freeman,* 107 F.3d 875. The claim does not arise in the context of a prison disturbance. *Id.* The court in *Freeman* provides little analysis on the issue of the excessive force claim, but simply determines that the plaintiff's due process rights were not violated. *Id.* Interestingly, the court cites to *Burton v. Livingston,* 791 F.2d 97 (8th Cir. 1986) to show that the due process inquiry includes a determination of whether officers acted in good faith or maliciously and sadistically, and whether force used exceeded the force needed. *Freeman,* 107 F.3d 875. *Burton* involved an inmate's excessive force claim. *Burton,* 791 F.2d 97. In *Burton,* the Eighth Circuit discusses *Daniels v. Williams* and *Rochin v. California, supra,* and emphasizes that in reviewing due process claims, courts must "survey-... anew ... each case through an examination of the benchmarks disclosed by the circumstances surrounding the case." *Id.* at 100. Accordingly, the Eighth Circuit does not adopt an objective standard in all pretrial detainee cases.

The district court in *Smith v. Copeland, supra,* appeared to apply an objective standard. *Smith,* 892 F. Supp. at 1229. The court did not mention the shocks the conscience test. It should be noted that the issues on appeal in *Smith* did not include issues concerning the claim for excessive force.

Petitioner's claim regarding the Seventh Circuit also lacks merit. Petitioner cites *Titran v. Ackman,* 893 F.2d 145 (7th Cir. 1990) and *Wilson v. Williams,* 83 F.3d 870 (7th Cir. 1996). In *Titran,* the court rejected the shocks the conscience standard. However, the case did not involve a prison disturbance and it was decided before *Lewis.*

In *Wilson,* though, the Seventh Circuit clearly distinguishes between excessive force claims arising in the context of a prison disturbance and those not. *Wilson,* 83 F.3d at 876-77. The court stated:

> Considering the fact that convicted prisoners and pretrial detainees are held together in correctional facilities, we recognize the impracticality of separate standards for these two groups in the context of a jail disturbance. Indeed, the Supreme Court has stated that there is no reason to distinguish between the two groups in reviewing challenged security practices because there is no basis to conclude that pretrial detainees pose any lesser security risk than convicted inmates. *Bell,* 441 U.S. at 546 n. 28. We may therefore assume, without deciding, that in the prison security context, the applicable standard for excessive force claims is provided by the Eighth Amendment, as explained in *Whitley* and *Hudson*: whether the measure taken inflicted unnecessary and wanton pain and suffering depends on "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson, 503 U.S. at 7* (citing *Whitley,* 475 U.S. at 320-21).

Id.

Petitioner's contentions that the Ninth Circuit adopts an objective reasonableness standard in all pretrial detainee situations is equally inapposite with the case law Petitioner cites. For instance, Petitioner cites to *White v. Roper,* 901 E.2d 1501 (9th Cir. 1990), a case involving a pretrial detainee claiming excessive use of force arising from officers' attempts to subdue the detainee. In addressing the standard for excessive force, the court cites to other Ninth Circuit cases wherein the shocks the conscience standard was applicable. *Id.* at 1507. Finally, Petitioner cited *Pierce v. Multnomah County,* 76 F.3d 1032 (9th Cir. 1996) which involved an excessive force claim of an arrestee detained without a warrant. The court recognized that to decide the appropriate standard, it "must determine

what constitutional protection governs this particular juncture of the custodial continuum." *Id.* at 1042-43. The court did not hold that an objective reasonableness standard was applicable to all pretrial detainee situations. *Id.*

B. The "Shocks the Conscience" Standard

As indicated in the above discussions regarding in the Third Circuit's opinion, the Court's opinion in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) and the case law identified in those cases, the shocks the conscience test is appropriately applied to a pretrial detainee's excessive force claim arising in the context of a prison disturbance. The discussions and reasoning will not be repeated herein. However, some of Petitioner's contentions about the statement of the law must be addressed.

First, in footnote 4 of Petitioner's Brief, Petitioner contends that Justices Scalia and Thomas, in their concurring opinion in *Lewis,* "took issue with the shocks the conscience test." Pet. 13. It is respectfully submitted that the focus of Justices Scalia and Thomas' concurring opinion is not with the shocks the conscience test, but rather that the majority in *Lewis,* an executive action case, did not first carefully describe the right to be protected and address whether the right asserted is traditionally protected. *Lewis,* 523 U.S. at 861-62. Similarly, Petitioner cites to *Washington v. Glucksberg,* 521 U.S. 702 (1997) to support the contention that the Court "took issue" with the shocks the conscience test. Pet. 13. The emphasis of the Court in *Glucksberg* was that courts must first reach the question of whether there is a protected liberty interest. *Glucksberg,* 521 U.S. 702. In *Glucksberg,* the Court determined that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process clause." *Id.* at 718.

Secondly, Petitioner concedes that the Fourth Circuit in *United States v. Cobb,* 905 F.2d 784 (4th Cir. 1990) adopted the *Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973) shocks the conscience test wherein the *Cobb* court applied the test to a pretrial detainee excessive force claim. Pet. 14. However, Petitioner inexplicably calls into question the "continuing vitality

in the Fourth Circuit." Petitioner cites *Taylor v. McDuffie*, 155 F.3d 479 (4th Cir. 1998) and *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997). In *Taylor*, a case involving a pretrial detainee excessive force claim, the court cited to *Norman v. Taylor*, 25 F.3d 1259 (4th Cir. 1994) which had the fact finder consider whether any force used was "repugnant to the conscience of mankind." *Taylor, 155* F.3d at 484 (citing *Norman*, 25 E.3d at 1263). In footnote 7 of *Taylor*, the court expressly stated that the holdings of *Norman* and *Riley* have not been "called into question, much less overruled, by an intervening decision of the Supreme Court. As a consequence, *Norman* and *Riley* continue to be the binding law of this Circuit." *Id.* In *Riley*, a case involving an excessive force claim of a pretrial detainee, the court applied the shocks the conscience test to the plaintiff's claim. *Riley*, 115 F.3d at 1168 n.4.

C. The "Malicious and Sadistic" Standard

Petitioner argues that the malicious and sadistic standard exists separate and apart from the shocks the conscience test. Pet. 15. To the contrary, the malicious and sadistic standard coexists with the shocks the conscience test. The jury may properly be charged with both standards. *See Lewis*, 523 U.S. at 851 (evaluating whether there was malicious motive and conscience shocking behavior); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (applying the shocks the conscience test and identifying factors to consider in determining whether the "constitutional line has been crossed," one of which is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm").

Petitioner also contends that the Second and Fifth Circuits "explicitly rejected the 'shocks the conscience' test" and cites, *inter alia*, *United States v. Walsh*, 194 F.3d 37 (2d Cir. 1999). Pet. 15. The Second Circuit does not reject the shocks the conscience test, but rather uses it. *Walsh*, 194 F.3d 37. The *Walsh* court, in addressing the defendant's claim of error that the jury was not charged on the shocks the conscience test but "was instructed exclusively on the "unnecessary and wanton infliction of pain" standard associated with Eighth Amend-

ment claims," stated:

> While the failure to articulate the correct standard for claims brought by pretrial detainees was technically error . . . [defendant] cannot demonstrate any prejudice resulting from the error.
>
> The factors used to evaluate the "shocks the conscience" and the "unnecessary and wanton" standards in the context of excessive force claims in the prison context are identical—specifically, the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good-faith effort to restore discipline or sadistically for the purpose of causing harm . . . Therefore, while the terms used to articulate the standard are different, in substance they are the same with respect to excessive force claims in the prison context, and the jury could not have been misled or confused by the failure to articulate the proper terminology.

Id. at 45-46.

Lastly, Petitioner cites to *Rodriguez v. Phillips,* 66 F.3d 470 (2d Cir. 1995), decided before *Walsh* and *Lewis. Rodriguez* does not involve the claim of excessive use of force by a pretrial detainee arising in the context of a prison disturbance. *Id.* Further, the Court in *Lewis* cited *Johnson v. Glick,* 481 F.2d 1028 (2d Cir. 1973), the case that the court in *Rodriguez* apparently questioned, stating that "[w]hile the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'point the way.' " *Lewis,* 523 U.S. at 846 (citing Judge Friendly's opinion in *Johnson,* 481 F.2d 1028).

In summary, the Federal Courts of Appeal are not in conflict as Petitioner has contended.

III. The Third Circuit Correctly Applied the Shocks the Conscience Test

Petitioner concludes that the Third Circuit erroneously adopted the shocks the conscience test as the appropriate con-

stitutional standard for pretrial detainee claims. As discussed above and below, the argument fails.

To reiterate previous discussions, when officials are confronted with a prison disturbance, the official must balance the threat that unrest poses to inmates, prison workers, administrators and visitors against the harm inmates may suffer if guards use force. *Hudson v. McMillian,* 503 U.S. 1, 6 (1992). The Court stated:

> Despite the weight of these competing concerns, corrections officials must make their decisions 'in haste, under pressure, and frequently without the luxury of a second chance. We accordingly concluded in *Whitley* that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.

Id. (citations omitted) (edits omitted). Under the circumstances of a pretrial detainee's excessive force claim arising in the context of a prison disturbance, a shocks the conscience standard is appropriate.

In support thereof, the Court in *City of Revere v. Massachusetts Gen. Hosp.,* 463 U.S. 239, 244 (1983), provides that the Due Process Clause provides pretrial detainees with "at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.* Petitioner misstated the Court in *Revere* when he stated that pretrial detainees have "more protection." Pet. 17.

Petitioner continues to stress that the focus of an excessive force claim for a pretrial detainee must be whether the detainee suffered punishment at all. As indicated above, the case law, the historical context and practices surrounding the due process clause on this issue refute the argument. The court's charge on excessive force was proper and did not create error.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GERMAN, GALLAGHER & MURTAGH

BY: _____

Margaret A. McAllister
Counsel of Record

Daniel J. Divis
Attorney

The Bellevue, Suite 500
200 S. Broad Street
Philadelphia, PA 19102
(215) 545-7700

Attorneys for Respondents